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SUPREME COURT, U.S.

NO. 82-5109

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT RIVERA,

Petitioner,

vs.

STATE OF OHIO

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS CUYAHOGA COUNTY, OHIO

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QUESTIONS PRESENTED

I

Whether Due Process and Double Jeopardy considerations preclude the state from bringing successive prosecutions for "offenses of similar import" (which could have been joined in a single indictment) and thereby expose an accused not only to a second trial and conviction but also, if convicted, to the imposition of a more severe sentence and justify same by vacating the previously entered valid judgment after the second conviction is obtained.

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT RIVERA,

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STATE OF OHIO

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PETITION FOR A WRIT OF CERTIORARI
TO THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO

To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Robert Rivera prays that a writ of certiorari issue to review the judgment of the Court of Appeals for Cuyahoga County, Ohio, which judgment became final on April 28, 1982, when the Supreme Court of Ohio dismissed petitioner's Memorandum in Support of Jurisdiction and denied further appellate review.

OPINIONS OF THE COURTS BELOW

The judgment entries of the Supreme Court of Ohio, dismissing the appeal and denying further appellate review, are attached hereto as Appendices "A" and "B", infra, at pages 13 and 14. The entry filed by the Court of Appeals, the judgment to which this petition is directed, is attached hereto as Appendix "C", infra, at page 15. The entry filed by the Court of Common Pleas (the trial court) is Appendix "D", infra, page 21.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was made final on April 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), on the basis that rights, privileges and immunities under the United States Constitution are contended to have been violated.

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Constitution of the United States:

Amendment V:

"***nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb *** nor be deprived of life, liberty, or property without due process of law ***."

Amendment XIV:

"***nor shall any State deprive any person of life, liberty, or property without due process of law ***."

Ohio Revised Code:

§2901.04:

"(A) Sections of the Revised Code defining offenses or penalties shall be strictly construed against the State, and liberally construed in favor of the accused***."

§2911.01:

"(A) No person, in attempting or committing a theft offense as defined in §2913.01 *** or in fleeing immediately after such attempt or offense shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in §2923.11 *** on or about his person or under his control ***.

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree."

§2913.01:

"(K) 'Theft offense' means any of the following:

(1) A violation of §2911.01 *** 2913.02 *** 2913.51***."

§2913.03:

"(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:

(1) Without the consent of the owner***;

(4) By threat.

(B) Whoever violates this section is guilty of theft ***."

§2913.51:

"(A) No person shall receive, retain, or dispose of property of another, knowing or having reasonable cause to believe it has been obtained through commission of a theft offense.

(B) Whoever violates this section is guilty of receiving stolen property***."

§2921.03:

"(A) No person, knowing and by force or by unlawful threat of harm, shall attempt to influence, intimidate, or hinder a public servant, party official, or witness in the discharge of his duty.

(B) Whoever violates this section is guilty of intimidation ***."

§2923.11:

"***(A) 'Deadly weapon' means any instrument, device or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried or used as a weapon. ***"

§2941.25:

"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.***"

STATEMENT OF THE CASE

On August 13, 1980, some incident allegedly occurred which resulted in an indictment (Case No. 57967) being returned against petitioner on August 26, 1980 for Receiving Stolen Property in violation of R.C. of Ohio §2913.51. On September 26, 1980 appellant plead guilty and was sentenced accordingly. On October 7, 1980 another indictment was returned (Case No. 59299) for Receiving Stolen Property, Aggravated Robbery, and Intimidation in violation of R.C. of Ohio, §§2913.51, 2911.01 and 2921.03 respectively. Again, all these offenses were alleged to have occurred on August 13, 1980. A Motion to Dismiss this second indictment as violative of Double Jeopardy was filed and denied by the trial court without comment on or about April 22, 1981. The State was permitted to nolle the second Receiving Stolen Property charge over objection. Appeal was taken from that judgment and final order. The Court of Appeals concluded that Aggravated Robbery and Receiving Stolen Property were "allied offenses" but refused to grant relief, stating that the first conviction could be set aside and, if tried and convicted, the defendant could be sentenced for the subsequent and more severe charges. The Ohio Supreme Court denied further appellate review.

STATEMENT OF THE FACTS[1/]

The Statement of the Case set forth in the previous page has relevance to this section as well and, as a consequence, it is incorporated herein as if fully rewritten. Additionally, the record reveals that the officer in charge of the overall investigation, Detective Margaret Foley, freely exchanged information with the several officers assisting her in this investigation (R 7,8). As to the current charges now in issue, all the investigation that was undertaken and the facts accumulated preceded the filing of the initial indictment on August 26, 1980 (R 11,15,21). In fact, no further information concerning any charges (including the intimidation allegation) were gathered after August 15, 1980 (R 26).

Interestingly enough, the State must have been aware of the original indictment when the second one was returned because it is clear from the face of the second indictment that the first case number was crossed out and another case number inserted (R 17,18). Despite this, the trial court denied the Motion to Dismiss and even refused to stay the proceedings pending appeal although such is mandated by the Ohio Supreme Court as well as this Court.

Of further significance here, the "facts" attributed to this case as "crucial" by the Court of Appeals are not fairly supported by the record. Their inclusion can only be intended to prejudice the petitioner's technical argument by focusing upon "facts" not in the record and unnecessary in evaluating the claimed defect in these successive proceedings.

1/ References to the Transcript of Proceedings of the Motion to Dismiss hearing will be designated by the prefix "R".

ARGUMENT RELIED ON FOR ALLOWANCE OF WRIT

I

Whether Due Process And Double Jeopardy Considerations Preclude The State From Bringing Successive Prosecutions For "Offenses Of Similar Import" (Which Could Have Been Joined In A Single Indictment) And Thereby Expose An Accused Not Only To A Second Trial And Conviction, But Also, If Convicted, To The Imposition Of A More Severe Sentence And Justify Same By Vacating The Previously Entered Valid Judgment After The Second Conviction Is Obtained.

The issue broached by this Petition as interpreted by the Court of Appeals raises a question of first impression for this Court. Petitioner initially argued that the State should be enjoined from proceeding on the second series of charges including Aggravated Robbery for he had once been convicted of a crime of "similar import," Receiving Stolen Property, arising from the same circumstances. It was petitioner's position that the second prosecution was foreclosed not only by joinder principles but also, and more importantly, as an attempt to exact additional punishment for an offense of "similar import" for which the accused had already fully answered. The remedy sought was that uniformly recognized, termination of the second prosecution. The reason was clear:

> "The prohibition is not against being twice punished, but against being twice put in jeopardy, and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." United States v. Ball, 163 U.S. 662, 669 (1896).

The language in Ex Parte Lange, 85 U.S. 163, 168 (1873), still rings true today:

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And ... there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts....

* * *

> ...The Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." Id., at 173.

More recently, this Court reaffirmed this thesis in Green v. United States, 355 U.S. 184, 187, 188 (1957):

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense...
>
> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The Appellate Court's holding in this case violates yet another principle set forth in Green, supra. That is:

> "The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance."

The ruling below would permit the State the option of obtaining convictions and, once having done that, enhancing those convictions through successive prosecutions, each carrying with it more severe punishments than those already achieved. Surely such a procedure violates not only the letter of the law but also the spirit behind virtually every decision ever rendered evaluating the double jeopardy protections. This bifurcated approach to penalty enhancement would vitiate the guarantee almost completely and ignores recent decisions, implicitly if not explicitly, condemning such an approach.

This Court, in Harris v. Oklahoma, 433 U.S. 682 (1977), examined the propriety of successive prosecutions for felony murder and armed robbery, concluding that the State could have tried the defendant for both offenses simultaneously and legitimately impose multiple sentences but could not achieve that same end by a series of separate trials. In Maumee v. Geiger, 45 Ohio St.2d 238, 344 N.E.2d 133 (1976), the Ohio Supreme Court held:

> "...[T]he concept that the principal offender cannot be found guilty of both larceny and receiving or concealing stolen property is not based upon the premise that there is a failure of proof of those facts which otherwise would constitute guilt of receiving or concealing, but instead is based upon a judicial doctrine sometimes referred to as 'merger'; the penal philosophy that a major crime often includes an inherent therein the component elements, in legal effect, are merged in the major crime...
>
> Although receiving is technically not an included offense of theft, it is, under R.C. 2941.25 an 'allied offense of similar import.' An accused may be tried for both but may be convicted and sentenced for only one. The choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense."

The court in Maumee was permitting the trial of multiple offenses of similar import in a single trial with punishment for only one. It was not formulating a policy for separate successive prosecutions.

In State v. Nelson, 51 Ohio Stpp.2d 31 (1977), petty theft and robbery arising out of a single incident was held to constitute the same offense for purposes of double jeopardy. That is analogous to the claim originally urged here and begrudgingly accepted by the Court of Appeals. In light of State v. Botta, 27 Ohio St.2d 196, 271 N.E.2d 776, 782 (1971), which precluded multiple sentences for separate offenses of similar import and reaffirmed the proposition that any acts constituting receiving stolen property are merged into the offense of grand theft,

the result the appellate court had to reach becomes most obvious. The authority for petitioner's challenge was buttressed further by Brown v. Ohio, 432 U.S. 161 (1977):

> "It has long been understood that separate statutory crimes need not be identical -- either in constitutional elements or actual proof -- in order to be the same within the meaning of the constitutional prohibition. ...[T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors... courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial... That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal. See Ashe v. Swenson, 397 U.S. 436 (1970)... and attempts to secure additional punishment after a prior conviction and sentence, see Green v. United States, 355 U.S. 184 (1957); North Carolina v. Pearce...."

See also In re Nielson, 131 U.S. 176 (1889).

Finally, the Court of Appeals decision below would make a nullity of the holding by this Court in Harris and Brown, both supra, Vitale v. Illinois, 447 U.S. 410 (1980). In the latter case, this Court concluded:

> "...[B]ecause Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged his claim of double jeopardy would be sustained under Brown and our later decision in Harris v. Oklahoma.
>
> * * *
>
> [A] person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense -- an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. Under Brown, the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense" (Emphasis added.)

These doctrines include within their pnumbra "crimes of similar import." The violation for which petitioner was convicted is absolutely intertwined and indispensible for the

prosecution now sought to be enjoined. The present challenge clearly comes within the ambit of Vitale and its predecessors Brown and Harris. The path the Court of Appeals now seeks to forge vitiates virtually every decision this Court has announced in this arena and creates a dangerous channel by which to circumvent the constitutional proscriptions against being twice placed in jeopardy. In doing so, the Court had to ignore its own precedent, State v. Stone, unreported C/A #35340 (1976) (a copy of which is attached as Appendix "E"):

> "...It has long been the rule that felonies and misdemeanors may be joined in one indictment so long as each offense is a separate count. Becker v. State, (1930), 39 Ohio App. 496. While the Ohio law does not require that related offenses be joined, the U.S. Supreme Court has included the doctrine of collateral estoppel within the protection of the double jeopardy rule. A failure to join some related offenses in one trial under this doctrine may preclude the State from subsequent prosecutions. Ashe v. Swenson, (1970), 397 U.S. 436.
>
> * * *
>
> In Commonwealth v. Campana, (1973), 452 Pa. 233, 304 A.2d 432, vacated on other grounds, 414 U.S. 808, 94 S.Ct. 73, on remand, 455 Pa. 622, 314 A.2d 854, cert. den. 417 U.S. 969, 94 S. Ct. 3172, the Supreme Court of Pennsylvania adopted the 'same transaction' test requiring the prosecution to bring in a single proceeding all the known charges arising from a single criminal episode. Although this court rejected that test, see State v. Williams and Cunningham, (Ct. App. Eighth Dist., Case No. 35276, November 18, 1976), it agrees with Judge Nix's concurring opinion in the Campana case. Judge Nix urged the adoption of the American Law Institute Model Penal Code rule on joinder, for public policy reasons. That rule is as follows: "...a defendant shall not be subject to separate trials for multiple trials based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.' [U.L.A. §1.07(2)]." (Emphasis added.)

All the current charges placed against this petitioner could have and should have been filed in the original action.

The State may not, unable to obtain a condition, review the results of a partial prosecution (see Appendix "F") and if unsatisfied bring successive suits subjecting an accused to repeated attempts to obtain a conviction where an all-inclusive original action would not have encumbered such exposure. To this end, Stone is again not only instructive but also compelling.

The Court of Appeals recognized that the offenses in question were of "similar import." It could not have avoided the conclusion, as in Stone, that the prosecuting officials knew of the original charges at the commencement of the second prosecution. Nevertheless, the Court of Appeals would institute a new procedure granting to the State the power to nullify previously-obtained valid convictions if it so desired. This path would wreak havoc to the effective administration of justice and the finalization of judgments against an individual and Double Jeopardy would cease to be recognized as a protection afforded an accused in Ohio.

As this Court acknowledged, "Harrassment of an accused by successive prosecutions... to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches." Gori v. United States, 367 U.S. 364 (1961); see Downum v. United States, 372 U.S. 734 (1963); and Conero v. United States, 48 F.2d 69 (1931).

This Court must not permit Ohio to institute the procedure it now molds for to do so would relegate the Double Jeopardy Clause to historical significance alone.

CONCLUSION

If the decision of the Court of Appeals is permitted to stand, the double jeopardy protections afforded an accused will cease to exist in the most litigious county in Ohio. The deviation from the recognized path precluding successive prosecutions will have been dealt a fatal but unconstitutional blow. Hopefully, this Court will not remain silent on so outrageous an assault on so fundamental a freedom.

Respectfully submitted,

Stephen Walker

STEPHEN WALKER, ESQ.
Attorney for Petitioner
Western Reserve Building, Suite 840
1468 West Ninth Street
Cleveland, OH 44113
216/781-7777

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition was delivered to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, OH, 44113, this 22nd day of July, 1982.

Stephen Walker

STEPHEN WALKER, ESQ.
Attorney for Petitioner

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NO. 82-5109

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT RIVERA,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT RIVERA,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Robert Rivera, moves this Court for an order permitting him to proceed in this Court in forma pauperis with his petition for writ of certiorari to review the judgment and final order of the Court of Appeals for the Eighth Judicial District of Ohio, pursuant to the provisions of Title 28, United States Code, §1915, and Rule 53 of the Supreme Court's Rules. The petitioner's separate Affidavit in support of this motion is attached hereto.

Stephen Walker

STEPHEN WALKER, ESQ.
Attorney for Petitioner
Suite 840, Western Reserve Building
1468 West 9th Street
Cleveland, Ohio 44113
(216) 781-7777

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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SUPREME COURT, U.S.

ROBERT RIVERA,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

AFFIDAVIT OF ROBERT RIVERA
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Robert Rivera, being duly sworn according to law, deposes and says:

1) That he is a citizen of the United States and that he is the petitioner in this cause.

2) That, because of poverty, he is unable to pay the cost of his action.

3) That he is presently without work and has been since his state court conviction; and he is presently without the necessary funds to defray the cost of this action.

4) That this review is being sought in good faith, and he does believe he is entitled to the redress being sought by his petition for review.

5) That the questions presented by the petition for certiorari (which questions are incorporated in this motion by reference) are substantial. Further, they involve indefensible constructions and interpretations given by the Cuyahoga County Court of Appeals to certain constitutional precedents developed by the decisions of this Court.

WHEREFORE, Robert Rivera (the affiant-petitioner) prays that he may be granted leave to proceed in this Court in forma pauperis.

Robert Rivera.
ROBERT RIVERA

SWORN TO BEFORE ME and subscribed in my presence this 16th day of June, 1982.

Stephen Walker
NOTARY PUBLIC
STEPHEN D. WALKER, Attorney At Law
Notary Public - State of Ohio
My commission has no expiration date.
Section 147.03 R. C.

MILLERS FALLS
BOND
COTTON CONTENT

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 82 TERM
To wit: April 28, 1982

State of Ohio,
Appellee,
vs.
Robert Rivera,
Appellant.

No. 82-297

APPEAL FROM THE COURT OF APPEALS

for CUYAHOGA *County*

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA *County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

FOR YOUR INFORMATION ONLY NOT FOR FILING

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for CUYAHOGA *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

APPENDIX "A"

SC79 BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 82 *TERM*

To wit: April 28, 1982

State of Ohio,

Appellee,

vs.

Robert Rivera,

Appellant.

No. 82-297

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for CUYAHOGA *County*

It is ordered by the Court that this motion is overruled.

FOR YOUR INFORMATION ONLY NOT FOR FILING

COSTS:

Motion Fee, $20.00, paid by Stephen Walker

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19 .....

..... Clerk

..... Deputy

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 43768

STATE OF OHIO

PLAINTIFF -APPELLEE

-VS-

ROBERT RIVERA

DEFENDANT -APPELLANT

APPEAL FROM

COMMON PLEAS COURT

No. CR-59299

JOURNAL ENTRY
AND
OPINION

DATE DEC 24 1981

DAY, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was submitted by counsel for the parties on briefs; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed but remanded with instructions. The single assignment of error was reviewed and upon review the following disposition made:

The posture of the facts in this case entails a somewhat tangential application of double jeopardy principles as well as more direct dispositive considerations. Factual elements crucial to decision are these:

(1) On August 13, 1980, defendant-appellant (defendant) took from Francis J. Kelly at knife point a motorcycle, title to the motorcycle, and $130.00.

. . . . .

(2) Defendant was arrested and, according to Kelly, phoned Kelly from jail threatening to kill him if he cooperated with the police. Kelly gave the information to the police but declined to prosecute.

(3) Defendant was indicted on one count of receiving stolen property on August 26, 1980 (Case No. Cr. 57967). Defendant plead guilty to this indictment on September 26, 1980.

(4) After a change of heart on the part of the prosecuting witness, defendant was indicted a second time on October 7, 1980, on charges growing out of the August 13, 1980, events (Case No. Cr. 592 This second indictment had three counts: (a) receiving stolen proper (b) aggravated robbery, and (c) intimidation. The count for receiving in the second indictment was nolled and defendant filed a motion to dismiss counts two and three on the ground of double jeopardy.

(5) The motion to dismiss was overruled.

The defendant appeals the denial of his motion to dismiss under the provenance of State v. Thomas (1980), 61 Ohio St. 2d 254, 258:

> "[T]he overruling of a motion to dismiss on the ground of double jeopardy is a final appealable order under R.C. 2953.02 and 2505.02."

He assigns one error:

> "Due Process and Double Jeopardy Protections Preclude The State From Bringing Successive Prosecutions For Offenses Of Similar Import."

For reasons adduced below the judgment is affirmed but remande with instructions for further proceedings in accordance with this opinion.

I.

The intimidation and aggravated robbery charges raise no double jeopardy issue. The former is based on a separate act with separate animus subsequent to August 13, 1980, the date the acts supporting the aggravated robbery and receiving charges allegedly took place. The latter is a different but allied offense to receiving. Thus, the separateness of the intimidation charge saves it from double jeopardy involvement. And the aggravated robbery count implicates not a duplicate, but an allied, offense. Therefore, the denial of the defendant's motion to dismiss in the trial court was not error.

II.

Double jeopardy is an issue because in Case No. Cr. 57967 defendant plead guilty to receiving[1/] only to be indicted again for that offense in one count of Case No. Cr. 59299. If there were no nolle of the latter, a double jeopardy issue would be presented. The nolle eliminates double jeopardy. However, there remains a question that could conceivably implicate double jeopardy but more directly involves the Ohio statute on allied offenses (R.C. §2941.25). This case will be remanded for trial and one of the questions to be resolved will be the effect of the allied offense doctrine on the prior plea of

---

1/ "§2913.51 Receiving stolen property.

"(A) No person shall receive, retain, or dispose of property of another, knowi or having reasonable cause to believe it has been obtained through commission of a theft offense.

"(B) Whoever violates this section is guilty of receiving stolen property, a m demeanor of the first degree. If the value of the property involved is one hundred fifty dollars or more, or if the property involved is any of the property listed in section 2913.71 of the Revised Code, or if the offender has previously been convicted of a theft offense, then receiving stolen property is a felony of the fourth degree." (Emphasis supplied.)

guilty in the event the defendant should be found guilty of aggravated robbery.

III.

The allied offense issue will arise only if the defendant is found guilty of aggravated robbery. He may be tried, but cannot be convicted, for both the aggravated robbery and for receiving the stolen property acquired in the theft offense, Maumee v. Geiger (1976 45 Ohio St. 2d 238, 244.[2/] Accordingly, the error assigned is without merit. The judgment dismissing the motion below is affirmed and the cause is remanded for trial in Case No. Cr. 59299 only on the counts for aggravated robbery and intimidating.

In the event that the defendant is convicted of aggravated robbery, the receiving conviction on the plea to the first indictmen is to be vacated, the first indictment nolled and the defendant credited for any time already served under the plea. The intimidati count is a separate offense and should convictions result on both aggravated robbery and intimidation sentencing shall proceed in acc with the multiple sentence statute, R.C. §2929.41 subject to credit for time served under the plea, if any.

IV.

Judgment affirmed and cause remanded for further proceedings i accordance with this opinion.

2/ Cf. Milanovich v. United States (1961), 365 U.S. 551, 555, 5 L.Ed. 2d 773,

This cause is affirmed but remanded to the Court of Common Pleas for further proceedings in accordance with this opinion.

It is ordered that appellee(s) recover of appellant(s) ..... its ..... costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution according to the instructions in the opinion.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

CELEBREZZE, J., CONCURS

PRYATEL, P.J., DISSENTS IN PART (see attached dissenting opinion)

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GERALD E. FUERST, CLERK
BY ..... DEP.

JUDGE
JACK G. DAY

For plaintiff-appellee: John T. Corrigan, Esq.
For defendant-appellant: Stephen Walker, Esq.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indic journalization, at which time it will become the judgment and order of the court and time period for review will begin to r

(d)

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 43768

State of Ohio

APPELLEE

-vs-

Robert Rivera

APPELLANT

APPEAL FROM

COMMON PLEAS CO

No. CR-59299

DISSENTING
JOURNAL ENTRY
AND
OPINION

DATE DEC 24 1981

PRYATEL, P.J. DISSENTS IN PART:

Respectfully I dissent in part. I would vacate the plea of guilty and the suspended sentence entered in Case No. CR-57967 and nolle the initial charge of Receiving Stolen Property as well. (See Brown v. Ohio (1977), 97 S. Ct. 2221, at 2227.)

STATE OF OHIO, CUYAHOGA COUNTY } SS.

IN THE COURT OF COMMON PLEAS

JANUARY TERM, 19

TO-WIT: April 22,1981, 19

STATE OF OHIO — PLAINTIFF

vs.

Robert Rivera — DEFENDANT

NO. CR-59299

INDICTMENT

Receiving Stolen Property w/ct
Aggravated Robbery w/ct Intimida

JOURNAL ENTRY

Count one (1) of this indictment is Nolled.
Hearing had on defendant's Motion to Dismiss.
Defendant's Motion is denied.
Case set for trial on May 7,1981.
Defendant's Oral Motion for Stay of Case Pending Appeal is denied.

Thomas O. Matia, Judge
va 4-23-r-n
n-4-23

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JUDGE Thomas O. Matia

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APPENDIX "D"

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 35340

STATE OF OHIO,

APPELLEE

-vs-

VIRGIL STONE,

APPELLANT

APPEAL FROM

COMMON PLEAS COURT

No. 18564-Cr.

JOURNAL ENTRY

DATE NOV 24 1976

This cause came on to be heard upon the pleading and the ..... transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

The defendant-appellant was arrested in the early morning hours of May 15, 1974, during the course of a narcotics raid in the City of Cleveland. He was found leaving an automobile parked immediately outside of the residence in which the raid was conducted. An officer patted him down and discovered a .45 caliber semi-automatic Colt revolver and a vial containing 40.7 grams of heroin. A second pat-down was conducted by another officer and an additional vial containing 8.3 grams of cocaine was removed from Stone's person. While completing

the arrests inside the residence, the police discovered and confiscated an attache case containing a kilogram of heroin. Also inside the attache case were personal papers and business documents belonging to the defendant-appellant.

Subsequently, on the 25th day of May, 1974, various indictments were returned against five defendants. In case CR 13983, the defendants were indicted for the sale of heroin. A separate indictment was returned against the defendant-appellant in CR 13984 for possession for sale of cocaine and carrying a concealed weapon. The defendant-appellant was found guilty of the possession for sale of heroin involving the kilogram discovered in the residence, and sentence was imposed for this offense. Subsequent to this conviction and the incarceration of the defendant-appellant, the charges alleged in the second case, CR 13984, possession for sale of cocaine and carrying a concealed weapon were dismissed by the Court of Common Pleas of Cuyahoga County for lack of a speedy trial. Appeal was taken to the Court of Appeals of this district and the Court of Appeals dismissed for failure to file the appeal in a timely fashion. This dismissal was entered on January 23, 1975. On February 16, 1975, the State of Ohio then indicted the defendant-appellant for the alleged possession of heroin for sale, alleging that the defendant-appellant had possessed heroin along with the cocaine and the gun charges which had been previously dismissed by the Court of Common Pleas and whose dismissal had been sustained by this Court of Appeals.

A trial of the new charge contained in the indictment of February 16, 1975, known as CR 18564, was held on August 26, 1975, and the defendant was found guilty of possession of heroin, a lesser included offense.

The defendant-appellant has brought this appeal on three assignments of error:

> "I. The double jeopardy provision of the Constitution protects defendants from harrassment and redundant litigation.
>
> "II. Due process requires that all the known charges 'based on the same conduct or arising out of the same criminal episode be tried together.'
>
> "III. Due process requires dismissal of an indictment for pre-accusation delay when the statutory periods are exceeded or it can be demonstrated that the delay caused actual prejudice."

Addressing ourselves to the first of the assignments of error, the court is constrained to consider the effect of Crim. R. 8 on the circumstances of this case. Crim. R. 8 provides that:

> "(A) Joinder of offenses. Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.
>
> "(B) Joinder of defendants. Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count."

It should be observed that the language of the rule is permissive rather than mandatory. It has long been the rule that felonies and misdemeanors may be joined in one indictment so long as each offense is a separate count. Becker v. State (1930), 39 Ohio App. 496. While the Ohio law does not require that related offenses be joined, the U.S. Supreme Court has included the doctrine of collateral estoppel within the protection of the double jeopardy rule. A failure to join some related offenses in one trial under this doctrine may preclude the state from subsequent prosecutions. Ashe v. Swenson (1970), 397 U.S. 436.

In Green v. United States (1957), 355 U.S. 184, 78 S. Ct. 221, the court said:

> "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."

In Commonwealth v. Campana (1973), 452 Pa. 233, 304 A. 2d 432, vacated on other grounds, 414 U.S. 808, 94 S. Ct. 73, on remand, 455 Pa. 622, 314 A. 2d 854, cert. den. 417 U.S. 969, 94 S. Ct. 3172, the Supreme Court of Pennsylvania adopted the "same transaction" test requiring the prosecution to bring in a single proceeding all the known charges arising from a single criminal episode. Although this court has rejected that test, see State v. Williams and Cunningham (Ct. App. Eighth Dist., Case No. 35276, November 18, 1976), it agrees with Judge Nix's concurring opinion in the Campana case. Judge Nix urged the adoption of the American Law Institute Model Penal Code rule on joinder, for public policy reasons. That rule is as follows:

> "...a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court." [U.L.A. §1.07 (2)].

The indictment of May 21, 1974, CR 13984, was determined by the State of Ohio to have "inadvertently" omitted the charge of possession for sale of heroin. The question raised is whether or not this "inadvertence" should be utilized as a justification for a subsequent indictment after the charges contained in the original indictment have been dismissed. The basis for the dismissal of these charges was the failure of the state to accord the defendant a speedy trial. Clearly, had the original indictment contained an additional charge, which was inadvertently or deliberately omitted, the same basis for dismissal

would have been applicable. To permit the state to reindict the defendant under these circumstances is to place a premium upon the original failure of the appellee. This would be a violation of the purpose of the criminal law which is to assure justice to every defendant, no matter how flagitious may be his crime. For these reasons, we find assignment of error number one to be well taken.

Having disposed of this assignment of error, which requires a reversal of the judgment heretofore entered by the lower court, we observe that assignments of error numbers two and three are basically disposed of by this determination and are well taken. The conviction is vacated and the case is remanded for further proceedings according to law.

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GERALD E. FUERST
By Peggy Pregueda

No other error appearing in the record, the conviction is vacated and the case is remanded to the Common Pleas Court for further proceedings according to law. It is, therefore, considered that said appellant(s) recover of said appellee(s) his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

KRENZLER, P.J., DISSENTS,

STILLMAN, J.,

*SILBERT, J. CONCUR.

*(SILBERT, J., Retired of the 8th Appellate District, sitting by assignment.)

For plaintiff-appellee: John T. Corrigan
For defendant-appellant: James R. Willis

PRESIDING JUDGE
ALVIN I. KRENZLER

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

STATE OF OHIO, } ss
CUYAHOGA COUNTY }

IN THE COURT OF COMMON PLEAS

SEPTEMBER TERM, 19 80

TO WIT: September 26, 1980 19

STATE OF OHIO — PLAINTIFF

vs

ROBERT RIVERA — DEFENDANT

NO. CR 57967

INDICTMENT

RECEIVING STOLEN PROPERTY (01)

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GERALD E. FUERST, CLERK

JOURNAL ENTRY

Now comes the Prosecuting Attorney on behalf of the State of Ohio and defendant Robert Rivera in open court with his counsel present and was fully advised of his constitutional rights.

Thereupon said defendant retracts his plea of not guilty heretofore entered, and for plea to said indictment says he is guilty of Receiving Stolen Property, RC 2913.51 as charged in the indictment,

which plea, on the recommendation of the Prosecuting Attorney is accepted by the court.

Thereupon the court inquired of the said defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

It is therefore ordered and adjudged by the court that said defendant Robert Rivera be imprisoned and confined in the Cleveland House of Corrections for a term of six (6) months, that he be sentenced to pay a fine of $500.00, ~~for~~ and that he pay the cost of this prosecution for which execution is awarded.

Incarceration time and fine suspended.

James J. McGettrick, Judge
kp-9-30-80
n-9-30-80
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JUDGE

APPENDIX "F"

NO. 82-5109

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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SUPREME COURT, U.S.

ROBERT RIVERA

Petitioner

vs.

THE STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

PATRICIA A. CLEARY
Assistant Prosecuting Attorney
Attorneys for Respondent
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7854

STEPHEN WALKER

Attorney for Petitioner
Western Reserve Building
Suite 840
1468 West Ninth Street
Cleveland, Ohio 44113

COUNTER QUESTIONS OF LAW

Respondent submits that the question presented by the record in this case is more properly stated as follows:

1. Due process and double jeopardy clauses do not preclude the State from prosecuting a defendant for receiving stolen property, aggravated robbery and intimidation under two indictments even though the events giving rise to the indictments constitutes the same course of criminal conduct.

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State v. Stone, (Cuy. Cty., Ct. App., Nov. 24, 1976) No. 35340 4

Statutes:

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT RIVERA

Petitioner

vs.

THE STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed but remanded the convictions with instructions. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court.

No substantial federal question is therefore presented by the petition for certiorari.

STATEMENT OF THE CASE

On August 13, 1980, petitioner was arrested in connection with the aggravated robbery of Francis J. Kelly. A one count indictment alleging the offense of receiving stolen property, Ohio Revised Code, Section 2913.51, was handed down by the Cuyahoga County Grand Jury on August 26, 1980 in Case No. CR 57967. Petitioner plead guilty to the indictment on September 26, 1980. On October 7, 1980, petitioner was indicted for receiving stolen property, aggravated robbery and intimidation in Case No. CR 59299. All the counts of the indictments relate to events surrounding the aggravated robbery of Kelly on August 13, 1980.

On April 21, 1981, count number one of indictment in CR 59299, receiving stolen property, was nolled upon the motion of the respondent. A hearing was had before Judge Thomas Matia upon petitioner's motion to dismiss counts two and three of the indictment, aggravated robbery and intimidation. This motion was overruled by the Court and his appeal to the Court of Appeals followed. On December 24, 1981, that Court affirmed the judgment of the trial court. The Ohio Supreme Court overruled petitioner's motion to grant jurisdiction on April 28, 1982.

STATEMENT OF FACTS

Respondent alleges that on August 13, 1980, petitioner robbed Francis J. Kelly at knife point of $130.00, his motorcycle, and the title thereto. Before the robbery, petitioner had told Kelly that he had received a parking ticket for illegally parking at a bar that both men had been at earlier. Based on the victim's description and information from the ticketing officer's description, petitioner was arrested. Kelly contends that petitioner telephoned him from jail and threatened to kill him if he cooperated with the police. Kelly relayed this information to police and refused to prosecute. After the indictment for receiving stolen property (to-wit: the title to a motorcycle) was handed down in CR 57967, Kelly indicated he was willing to prosecute.

REASONS FOR DENYING THE WRIT.

1. Due process and double jeopardy clauses do not preclude the State from prosecuting a defendant for receiving stolen property, aggravated robbery and intimidation under two indictments even though the events giving rise to the indictments constitutes the same course of criminal conduct.

Respondent asserts that no fundamental constitutional issues exist in the instant case. Petitioner claims the two separate indictments handed down by the Grand Jury constitute a violation of the principles of double jeopardy and collateral estoppel. He further alleges that the successive indictments were an intentional, precedural maneuver on the part of respondent to "enhance" the penalty petitioner faces as a result of his actions. Each of these arguments will be dealt with separately.

Double Jeopardy

The three charges of concern here are receiving stolen property, Ohio Revised Code, Section 2913.51; aggravated robbery, Ohio Revised Code, Section 2911.01; and, intimidation, Ohio Revised Code, Section 2921.03. The statute regarding intimidation reads, in pertinent part, as follows: "No person, knowingly and by force or by unlawful threat of harm, shall attempt to influence, intimidate, or hinder a . . . witness in the discharge of his duty." No logical double jeopardy argument can be made regarding this offense and the two previous offenses to the effect that they are lesser included offenses or share common elements. The thrust of petitioner's argument in this area is that the offense of receiving stolen property is a lesser included offense of aggravated robbery, and as such, a plea to the former precludes prosecution of the latter.

The provisions in the law relating to double jeopardy come into play when a defendant is placed in jeopardy more than once as a result of a specific criminal act. Such is not the case here. The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall ". . . be subject for the same offense to be twice put in jeopardy of life or limb . . ." United States Constitution Amendment Five (emphasis added). In Blockburger v. United States, 284 U.S. 299 (1932), the

Court established the "same evidence test" for defining the phrase "same offense". The test utilized to determine whether one or two offenses exist in a multiple count indictment is whether each count of the offense requires proof of a fact which the others do not. Id. at 304. In the case at hand, the offense of aggravated robbery, Ohio Revised Code, Section 2911.01, requires the State to prove that the petitioner had a knife on his person or under his control when attempting or committing or fleeing after a theft offense upon one Francis Kelly. The State must prove that Kelly was robbed of his motorcycle and cash. The offense of receiving stolen property, Ohio Revised Code, Section 2913.51, to which petitioner plead guilty, required the State to prove petitioner did receive, retain, or dispose of a certificate of title, the property of Francis Kelly, knowing or having reasonable cause to believe it had been obtained through the commission of a theft offense. Each of the above offenses obviously require proof of material facts that the other does not.

Petitioner asserts that the case of State v. Stone (Cuy. Cty. Ct. App., 1976) No. 35340 is controlling in the instant case with regard to his claim of double jeopardy. In Stone, the defendant, along with several other co-defendants, was indicted for the sale of heroin. He was found guilty of this offense. Defendant was also separately indicted for sale of cocaine and carrying a concealed weapon. These indictments were dismissed by the Common Pleas Court for lack of speedy trial. Subsequently, the defendant was indicted for possession of heroin for sale. All three indictments arose from the same course of criminal conduct. The Court reiterated the status of Ohio law in refusing to adopt the "same transaction" test. In Brown v. Ohio, 97 S. Ct. at 2227 (1977), Justice Brennan, in a concurring opinion, had advocated the adoption of the "same transaction" test which would require the State, in one prosecution, to proceed on all charges against a defendant arising out of a single transaction. The majority in Brown refused to adopt such a test, instead relying on the standards enumerated in Blockburger, supra, for defining "same offense" in cases involving multiple trials:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not . . ."

Brown, at 2225. The Court in Stone, supra, upheld petitioner's double jeopardy claim as the third indictment would have been dismissed for failure to comply with speedy trial requirements if it had been brought at the time of the second indictments. The Court at no time addressed the propriety of indicting the offense alleged against the petitioner under two separate indictments. Stone does not adopt the "same transaction" test nor do any similarity of facts exist between Stone and the instant case.

The Court of Appeals in the instant case found the offense of receiving stolen property, to which petitioner plead guilty, to be an allied offense of similar import to the offense of aggravated robbery as alleged in the second indictment under the allied offense statute, Ohio Revised Code, Section 2941.25. Subsection A of that section provides that if the same conduct of a defendant constitutes two or more allied offenses of similar import, the defendant may be convicted of only one. The statute does not preclude indictment and trial on the multiple offenses charged. Indeed the issue of the existence of allied offenses arises only upon conviction of more than one offense. The allied offenses statute is a sentencing statute. Maumee v. Geiger, 45 Ohio St. 2d 238 (1976).

Collateral Estoppel

Petitioner contends that the doctrine of collaterial estoppel precludes prosecution in Case No. CR 59299.

The doctrine of collateral estoppel prevents the relitigation of an issue necessarily decided in defendant's favor at the first trial, even where the two offenses are different. Ashe v. Swanson, 397 U.S. 436 at 443 (1970). In the instant case, the petitioner's plea of guilty to receiving stolen property in Case No. CR 57967 precludes the application of this doctrine as no issue could be construed as having been resolved in the petitioner's favor by his plea of guilty. Even if the petitioner had been found not guilty at trial on this offense, the subsequent indictment and trial would not violate either the

doctrine of collateral estoppel or double jeopardy as the offense charged in the subsequent indictment are completely separate offenses from receiving stolen property, without identical, essential issues of fact.

Successive Indictments

Petitioner contends that prosecution on the aggravated robbery and intimidation indictments in CR 59299 must be precluded as they "could have" been brought at the same time as the indictment for receiving stolen property in CR 57967. Petitioner would have one think compulsory joinder is the law in Ohio. The State is not obligated to bring at one time all potential charges against a defendant which arises from the same criminal act, although that is usually the case. The State is also interested in the efficient administration of justice. In the case at hand, petitoner's unlawful activity was the reason two separate indictments were handed down. For him to turn now and bemoan this as injustice, when his actions gave rise to the multiple indictments, is to make a mockery of our judicial system. Petitioner asserts that the case of Harris v. Oklahoma, 433 U.S. 682, 53 L. Ed. 2d 1052 precludes separate trials because the State could have tried the defendant for murder and robbery at one time and thus acknowledged the defendant's claim of double jeopardy. In Harris, the Court held that when conviction for a greater crime cannot be had without conviction of the lesser crime, the defendant may not be prosecuted for the lesser offense after conviction for the greater. The double jeopardy clause precludes prosecution as proof of the underlying felony is needed to prove the intent necessary for a felony murder conviction. Justice Brennan advocated the adoption of the principle of mandatory joinder in Harris. However, mandatory joinder has never been adopted by the majority of the United States Supreme Court or Ohio Supreme Court.

CONCLUSION

Petitioner assumes that conviction of the offense of receiving stolen property precludes prosecution on the later indictments. As has been shown

here, receiving stolen property is not a lesser included offense of aggravated robbery for purposes of double jeopardy. Essential identical issues of fact do not exist. At best, they are allied offenses. Prosecution on the indictment for intimidation cannot be precluded by means of any rational argument. Even if compulsory joinder were the rule in Ohio, it is unconceivable that a Court would permit the defendant to escape prosecution because of his wrongful act.

This case does not involve constitutional principles, but statutory construction and intent.

Respondent moves this Honorable Court to deny petitioner's writ of certiorari.

Respectfully submitted,

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

BY: Patricia A. Cleary
PATRICIA A. CLEARY
Assistant Prosecuting Attorney
Attorneys for Respondent
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

SERVICE

A copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari was mailed this 16th day of August, 1982, to Stephen Walker, Attorney for Petitioner, Western Reserve Building, Suite 840, 1468 West Ninth Street, Cleveland, Ohio 44113.

Patricia A. Cleary
Assistant Prosecuting Attorney

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT RIVERA

Petitioner

vs.

THE STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

AFFIDAVIT OF FILING

I, John T. Corrigan, being first duly cautioned and sworn, deposes and says that I am a member of the bar of this Court and otherwise competent to execute this affidavit, pursuant to Rule 28.2, Rules of the United States Supreme Court. On the sixteenth day of August, 1982, I caused to be sent by first class, prepaid United States mail, to the Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C., 20543, one copy of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Supreme Court in the above captioned matter. Such mailing was made within the time permitted by this Court for such a filing.

John T. Corrigan

JOHN T. CORRIGAN, Prosecuting Attorney
The Justice Center, 1200 Ontario Street
Cleveland, Ohio 44113 (216) 443-7747
Attorney for Respondent

SWORN to before me and subscribed in my presence this 13th day of August, 1982.

Sheila K. Burt

NOTARY PUBLIC

SHEILA K. BURT
Notary Public, State of Ohio - Cuya. Cty
My Commission Expires Jan. 15, 1986

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 35340

STATE OF OHIO, APPEAL FROM

COMMON PLEAS COURT

APPELLEE No. 18564-Cr.

-vs-

VIRGIL STONE, JOURNAL ENTRY

APPELLANT

DATE NOV 24 1976

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

The defendant-appellant was arrested in the early morning hours of May 15, 1974, during the course of a narcotics raid in the City of Cleveland. He was found leaving an automobile parked immediately outside of the residence in which the raid was conducted. An officer patted him down and discovered a .45 caliber semi-automatic Colt revolver and a vial containing 40.7 grams of heroin. A second pat-down was conducted by another officer and an additional vial containing 8.3 grams of cocaine was removed from Stone's person. While completing

the arrests inside the residence, the police discovered and confiscated an attache case containing a kilogram of heroin. Also inside the attache case were personal papers and business documents belonging to the defendant-appellant.

Subsequently, on the 25th day of May, 1974, various indictments were returned against five defendants. In case CR 13983, the defendants were indicted for the sale of heroin. A separate indictment was returned against the defendant-appellant in CR 13984 for possession for sale of cocaine and carrying a concealed weapon. The defendant-appellant was found guilty of the possession for sale of heroin involving the kilogram discovered in the residence, and sentence was imposed for this offense. Subsequent to this conviction and the incarceration of the defendant-appellant, the charges alleged in the second case, CR 13984, possession for sale of cocaine and carrying a concealed weapon were dismissed by the Court of Common Pleas of Cuyahoga County for lack of a speedy trial. Appeal was taken to the Court of Appeals of this district and the Court of Appeals dismissed for failure to file the appeal in a timely fashion. This dismissal was entered on January 23, 1975. On February 16, 1975, the State of Ohio then indicted the defendant-appellant for the alleged possession of heroin for sale, alleging that the defendant-appellant had possessed heroin along with the cocaine and the gun charges which had been previously dismissed by the Court of Common Pleas and whose dismissal had been sustained by this Court of Appeals.

A trial of the new charge contained in the indictment of February 16, 1975, known as CR 18564, was held on August 26, 1975, and the defendant was found guilty of possession of heroin, a lesser included offense.

The defendant-appellant has brought this appeal on three assignments of error:

"I. The double jeopardy provision of the Constitution protects defendants from harrassment and redundant litigation.

"II. Due process requires that all the known charges 'based on the same conduct or arising out of the same criminal episode be tried together.'

"III. Due process requires dismissal of an indictment for pre-accusation delay when the statutory periods are exceeded or it can be demonstrated that the delay caused actual prejudice."

Addressing ourselves to the first of the assignments of error, the court is constrained to consider the effect of Crim. R. 8 on the circumstances of this case. Crim. R. 8 provides that:

"(A) Joinder of offenses. Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

"(B) Joinder of defendants. Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count."

It should be observed that the language of the rule is permissive rather than mandatory. It has long been the rule that felonies and misdemeanors may be joined in one indictment so long as each offense is a separate count. Becker v. State (1930), 39 Ohio App. 496. While the Ohio law does not require that related offenses be joined, the U.S. Supreme Court has included the doctrine of collateral estoppel within the protection of the double jeopardy rule. A failure to join some related offenses in one trial under this doctrine may preclude the state from subsequent prosecutions. Ashe v. Swenson (1970), 397 U.S. 436.

In Green v. United States (1957), 355 U.S. 184, 78 S. Ct. 221, the court said:

> "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."

In Commonwealth v. Campana (1973), 452 Pa. 233, 304 A. 2d 432, vacated on other grounds, 414 U.S. 808, 94 S. Ct. 73, on remand, 455 Pa. 622, 314 A. 2d 854, cert. den. 417 U.S. 969, 94 S. Ct. 3172, the Supreme Court of Pennsylvania adopted the "same transaction" test requiring the prosecution to bring in a single proceeding all the known charges arising from a single criminal episode. Although this court has rejected that test, see State v. Williams and Cunningham (Ct. App. Eighth Dist., Case No. 35276, November 18, 1976), it agrees with Judge Nix's concurring opinion in the Campana case. Judge Nix urged the adoption of the American Law Institute Model Penal Code rule on joinder, for public policy reasons. That rule is as follows:

> "...a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court." [U.L.A. §1.07 (2)].

The indictment of May 21, 1974, CR 13984, was determined by the State of Ohio to have "inadvertently" omitted the charge of possession for sale of heroin. The question raised is whether or not this "inadvertence" should be utilized as a justification for a subsequent indictment after the charges contained in the original indictment have been dismissed. The basis for the dismissal of these charges was the failure of the state to accord the defendant a speedy trial. Clearly, had the original indictment contained an additional charge, which was inadvertently or deliberately omitted, the same basis for dismissal

would have been applicable. To permit the state to reindict the defendant under these circumstances is to place a premium upon the original failure of the appellee. This would be a violation of the purpose of the criminal law which is to assure justice to every defendant, no matter how flagitious may be his crime. For these reasons, we find assignment of error number one to be well taken.

Having disposed of this assignment of error, which requires a reversal of the judgment heretofore entered by the lower court, we observe that assignments of error numbers two and three are basically disposed of by this determination and are well taken. The conviction is vacated and the case is remanded for further proceedings according to law.

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No other error appearing in the record, the conviction is vacated and the case is remanded to the Common Pleas Court for further proceedings according to law. It is, therefore, considered that said appellant(s) recover of said appellee(s) his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

KRENZLER, P.J., DISSENTS.

STILLMAN, J.,

*SILBERT, J. CONCUR.

PRESIDING JUDGE
ALVIN I. KRENZLER

*(SILBERT, J., Retired of the 8th Appellate District, sitting by assignment.)
For plaintiff-appellee: John T. Corrigan
For defendant-appellant: James R. Willis

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.